No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

RACHEL AGOSTINI, ET AL.,

Petitioners,

v.

BETTY-LOUISE FELTON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should overrule its decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), which held that the Establishment Clause prohibits the furnishing of Title I remedial services to eligible parochial school children in the same setting as their public school counterparts — on the premises of the schools they attend.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were:

Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side and Allen H. Zelon, plaintiffs;

the Chancellor of the Board of Education of the City of New York and Board of Education of the City School District of the City of New York, defendants;

the Secretary of the United States Department of Education, defendant;

Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnacion, Maria L. Fernandez, Dolly Cutrera Then and Joseph M. Then, Margaret Figueroa, Michele Gallo, Marie Sejour, Joan Jackson, Cheryl Malcousu, Tonya Stevens and Rosemarie Vasquez, defendant-intervenors.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

A. Title I 3

B. Implementation of Title I Before *Aguilar v. Felton* 6

C. *Aguilar v. Felton* and Its Aftermath 6

D. The Decisions Below 9

REASONS FOR GRANTING THE WRIT 10

I. *AGUILAR v. FELTON* IS INCONSISTENT WITH SUBSEQUENT DECISIONS AND RESTS UPON AN UNWARRANTED INTERPRETATION OF THE ESTABLISHMENT CLAUSE 12

A. A Majority of the Court Has Called for the Overruling or Reconsideration of *Aguilar* 12

B. *Aguilar* Conflicts with Subsequent Decisions of this Court 13

C. *Aguilar* Rests on an Extreme Application of a Repudiated Notion of Excessive Entanglement 19

II. *AGUILAR* HAS HAD A DISRUPTIVE EFFECT ON A NATIONWIDE PROGRAM THAT IS THE FEDERAL GOVERNMENT'S PRINCIPAL COMMITMENT TO ELEMENTARY AND SECONDARY EDUCATION 24

CONCLUSION 26

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Page

Afroyim v. Rusk, 387 U.S. 253 (1967) 19
Aguilar v. Felton, 473 U.S. 402 (1985) . . . . . *passim*
Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989) 21
Andrews v. Louisville & Nashville Railroad, 406 U.S. 320 (1972) 19
Barnes v. Cavazos, 966 F.2d 1056 (6th Cir. 1992) . . . 9
Board of Education of Kiryas Joel Village School District v. Grumet, 114 S. Ct. 2481 (1984) 3, 12, 13, 14, 21, 22, 23
Board of Education v. Alexander, 983 F.2d 745 (7th Cir. 1992) 9
Board of Education v. Allen, 392 U.S. 236 (1968) . . 18
Board of Education v. Mergens, 496 U.S. 226 (1990) 16, 17, 19
Bowen v. Kendrick, 487 U.S. 589 (1988) 18, 22
Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) 21
Committee for Pub. Educ. and Religious Liberty v. Secretary, United States Dep't of Education, No. 88-CV-96 (E.D.N.Y.) 9
Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 19

Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) 20
Everson v. Board of Education, 330 U.S. 1 (1947) . . 18
Felton v. Secretary, United States Dep't of Education, 78 Civ. 1750 (E.D.N.Y.) 7
Hunt v. McNair, 413 U.S. 734 (1973) 18
Lee v. Weisman, 505 U.S. 577 (1992) 21
Lemon v. Kurtzman, 403 U.S. 602 (1971) . . . 7, 19, 20, 21, 22, 23
Marchetti v. United States, 390 U.S. 39 (1968) 19
Meek v. Pittenger, 421 U.S. 349 (1975) 16
Monell v. Department of Social Services, 436 U.S. 658 (1978) 19
Mueller v. Allen, 463 U.S. 388 (1983) 17
Pulido v. Cavazos, 934 F.2d 912 (8th Cir. 1991) . 9, 25
Roemer v. Board of Public Works, 426 U.S. 736 (1976) 12, 18, 22
Rosenberger v. Rector of the University of Virginia, 115 S. Ct. 2510 (1996) 13, 14, 16, 19, 21
School District of Grand Rapids v. Ball, 473 U.S. 373 (1985) 13, 16
Tilton v. Richardson, 403 U.S. 672 (1971) 18
Walker v. San Francisco Unified School District, 46 F.3d 1449 (9th Cir. 1995) 9, 25
Wallace v. Jaffree, 472 U.S. 38 (1985) 20
Widmar v. Vincent, 454 U.S. 263 (1981) 17, 18
Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) 17, 19
Wolman v. Walter, 433 U.S. 229 (1977) 26
Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) 15, 16, 19, 21

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I 2
20 U.S.C. § 6302(a) 5
20 U.S.C. § 6313 . . . . . 5, 16
20 U.S.C. § 6315(b) 5, 16
20 U.S.C. § 6321(a) 5
20 U.S.C. § 6322(b) 5, 16
20 U.S.C. § 6332-35 5
28 U.S.C. § 1254(1) 2

FEDERAL RULES AND REGULATIONS AND LEGISLATIVE HISTORY

Fed. R. Civ. P. 60(b) 9
Fed. R. Civ. P. 60(b)(5) 9
34 C.F.R. § 200.52(b) (1994) 6
60 Fed. Reg. 34,800 (1995) 4, 5, 16
60 Fed. Reg. 34,808 (1995) 5
Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 4
Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297 4
Education Consolidation and Improvement Act, in Pub. L. No. 97-35, 95 Stat. 357, 464 (1981) . . 4
Elementary and Secondary Education Act of 1965 3
S. Rep. No. 100-222 (1988) 8
S. Rep. No. 89-146 (1965) 3, 4
H. Rep. No. 103-425 (1994) 4

MISCELLANEOUS

Statement of Secretary of Education Riley (Oct. 25, 1995) 8, 26
Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673 (1980) 20
Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 Geo. Wash. L. Rev. 645 (1992) 20
Mary Ann Glendon & Raul Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, (1991) 20
Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3 (1978) 20
Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115(1992) . . 20
Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795 (1993) 20
Gary J. Sinson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 Cornell L. Rev. 905 (1987) . . . 20

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Petitioners Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnacion, Maria L. Fernandez, Dolly Cutrera Then and Joseph M. Then, Margaret Figueroa, Michele Gallo, Marie Sejour, Joan Jackson, Cheryl Malcousu, Tonya Stevens, and Rosemarie Vasquez, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The Memorandum and Order of the district court is unreported and is reproduced in the Appendix at 1a. The court of appeals' Summary Order is unreported and reproduced in the Appendix at 11a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 30, 1996. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . .

STATEMENT OF THE CASE

This case was before this Court in 1984 and decided under the name *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar*, the Court held that the Establishment Clause prohibits the furnishing of Title I remedial educational services to eligible school children on the premises of church-related schools. Specifically, the Court held that a public school board's "monitoring" of its own Title I teachers to ensure that they do not inject religion into remedial classes taught in church-related schools "inevitably

results in the excessive entanglement of church and state." 473 U.S. at 409.

As a result of this Court's decision in *Aguilar*, school boards in New York City and throughout the country have struggled to find alternative methods of delivering Title I services to eligible children attending church-related schools. The available alternatives are both more expensive and less effective than on-premises instruction, yet those alternatives themselves have been challenged, based on expansive readings of the Court's opinion in *Aguilar*.

At the same time, this Court has retreated from the interpretation of the Establishment Clause that prevailed in *Aguilar* — to the point that five Members of the Court have expressly called for *Aguilar's* overruling or invited its reconsideration. *See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2498 (O'Connor, J.), 2505 (Kennedy, J.), 2515 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J.) (1994). This petition responds to those indications of dissatisfaction with *Aguilar* and asks the Court to overrule *Aguilar* once and for all.

A. Title I

In 1965 Congress enacted, and President Johnson signed into law, Title I of the Elementary and Secondary Education Act of 1965.[1] Title I was the centerpiece of a congressional effort to "bring better education to millions of disadvantaged youth who need it most." S. Rep. No. 89-146 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1446, 1450. Having determined that "there is a close relationship between

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[1] The early history of Title I is discussed in this Court's opinion in *Aguilar v. Felton*, 473 U.S. 402, 404-06 & nn.1-3 (1985).

conditions of poverty and lack of educational development," *id.*, Congress passed Title I to provide financial assistance to local educational agencies serving areas with concentrations of children from low-income families. By enabling local educational agencies to expand and improve their programs for meeting the special educational needs of economically and educationally deprived children, this legislation was to be a "very potent instrument . . . in the eradication of poverty and its effects." 1965 U.S.C.C.A.N. at 1450.

The program enacted in 1965 has remained in effect, under the name Title I or Chapter 1, for over three decades.[2] Throughout that period it has been the federal government's largest and most important commitment to elementary and secondary education,[3] with appropriations in fiscal year 1995 totaling $7.4 billion.

Title I grants are provided to qualifying state educational agencies, which in turn distribute the funds to

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[2] The program was reenacted as Chapter 1 of the Education Consolidation and Improvement Act, part of Pub. L. No. 97-35, 95 Stat. 357, 464 (1981), and later as Chapter 1 of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297. In 1994, pursuant to the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified in relevant part as 20 U.S.C. §§ 6301-38), Congress renamed the Chapter 1 program Title I, Part A [hereinafter "Title I"]. Today's Title I program is identical to its predecessors in all respects relevant to this case.

[3] *See* 60 Fed. Reg. 34,800, 34,800 (1995) ("As the largest of all [Elementary and Secondary Education Act] programs, Title I is the centerpiece of the ESEA's efforts to help the neediest schools and students . . . ."); H. Rep. No. 103-425 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2807, 2810 ("Title I . . . [is] the largest federal elementary and secondary educational program.").

eligible local educational agencies ("LEAs"), which have the responsibility for managing Title I programs. 20 U.S.C. §§ 6302(a), 6332-35 (1994). In New York City, the local educational agency is the Board of Education of the City of New York.

To be eligible for Title I remedial services, a child must be both economically and educationally disadvantaged. A child is economically disadvantaged if he resides in an area that has a high concentration of low-income families. 20 U.S.C. § 6313. He is educationally disadvantaged if he is progressing at a level below normal for his age. 20 U.S.C. § 6315(b).

Children attending both public and private schools are eligible for Title I remedial services if they meet the statutory criteria of economic and educational disadvantage. 20 U.S.C. §§ 6313, 6315(b), 6321. Eligibility is determined without regard to the religious affiliation of the student or the school he attends. Federal law, in fact, requires that instructional services be provided to private school students "on an equitable basis" with their public school counterparts. 20 U.S.C. § 6321(a); 60 Fed. Reg. 34,800, 34,807 (1995) (to be codified at 34 C.F.R. § 200.10(a) (1996)).

Title I funds, however, may not be used to meet the "needs of the private school" itself or the "general needs of children in the private school." *Id.* (to be codified at 34 C.F.R. § 200.12(b)). Title I funds may be used only for services that supplement, and do not supplant, services otherwise available from nongovernmental sources. 20 U.S.C. § 6322(b); 60 Fed. Reg. at 34,808 (to be codified at 34 C.F.R. 200.12(a)). And all Title I services provided to children in private schools must be "secular, neutral, and nonideological." 20 U.S.C. § 6321(a)(2).

B. Implementation of Title I Before *Aguilar v. Felton*

In 1966, after the enactment of Title I, the Board of Education of the City of New York (the "Board") began to provide remedial educational services to economically and educationally disadvantaged students in both public and private schools. To ensure that "[Title] I services . . . for educationally deprived children in private schools [were] equitable (in relation to the services provided to public school children)," 34 C.F.R. § 200.52(b) (1994), the Board delivered services to private school students in the same setting in which services were delivered to their public school counterparts — in classrooms located in the students' regular schools. Title I services were provided in the students' schools because requiring them to go elsewhere would result in disruption and loss of valuable instructional time.[4]

Under this program, teachers employed by the Board went to the private schools solely to provide Title I instruction to eligible students. *See Aguilar v. Felton,* 473 U.S. at 406. The services provided at the private schools included remedial reading, reading skills, remedial mathematics, English as a second language, and guidance.

C. *Aguilar v. Felton* and Its Aftermath

This Court's 1985 decision in *Aguilar v. Felton* threw New York's Title I program — and Title I programs around the country — into turmoil. In *Aguilar* the Court invalidated New York's Title I program to the extent that it authorized

[4] *See* Declaration of Margaret O. Weiss in *Felton v. Secretary, United States Dep't of Education*, 78 CV-1750 (JG) ("Weiss Decl.") ¶¶ 27-32, 78-88 (Oct. 16, 1995).

public employees to provide instructional and counseling services inside sectarian schools. The Court did not question the secular nature of Title I instruction; it found fault only with the location where the services were provided — inside schools that were affiliated with a church or religion. The Court noted what it perceived as a risk that public school personnel operating in the environment of a church-related school might be induced to advocate the sectarian aims of the school. Applying the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court then held that the monitoring designed to prevent that result constituted excessive entanglement of church and state. *Aguilar*, 473 U.S. at 409. Upon remand, the district court enjoined the Chancellor and Board from providing Title I services in the classrooms of religious schools.[5]

The *Aguilar* decision forced the City of New York to implement alternative methods of delivering Title I services to parochial school children. The alternatives included the use of public school classrooms, mobile instructional units or vans ("MIUs"), leased sites, and computer-assisted instruction in the parochial schools ("CAI"). Substantially similar alternative methods have been implemented in other school districts around the country.

These post-*Aguilar* Title I delivery methods are vastly more expensive than the on-premises instruction that was prohibited in *Aguilar*. In New York City alone, the additional cost of providing Title I services by way of the alternative methods necessitated by *Aguilar* is approximately $15 million per year. The total cost of compliance with

[5] *Felton v. Secretary, United States Dep't of Education*, 78 Civ. 1750 (ERN), slip op. at 3 (E.D.N.Y. Sept. 26, 1985), *aff'd*, 787 F.2d 35 (2d Cir. 1986) (App. 14a).

Aguilar in New York City alone has been in excess of $100 million.[6]

The post-*Aguilar* delivery methods are also educationally inferior to on-premises instruction by Title I teachers. Eligible students in parochial schools are required to leave their school buildings to receive the instruction they need. That results in disruption and lost instructional time, which is something that these students — the very ones who are experiencing the greatest difficulty keeping up with their regular instruction — can ill afford.[7] Students who receive computer-assisted instruction in their regular school building avoid the disruption and loss of instruction time, but are denied the advantages of face-to-face contact with a teacher.

Although these alternative methods of delivering Title I services are economically and educationally inferior, they have themselves been challenged. In a series of lawsuits filed across the country, plaintiffs have invoked an expansive reading of *Aguilar* to argue that the Establishment Clause prohibits (1) the use of mobile vans and computer-assisted instruction to provide Title I services to parochial school children, and (2) the method adopted by the United States Department of Education to allocate the additional costs of these alternatives. These challenges have been rejected by the United States Courts of Appeals for the Sixth, Seventh,

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[6] *See* Weiss Decl. ¶ 101 (approximately $15 million per annum) & Chart B ($87 million through 1993-94); Statement of Secretary of Education Riley (Oct. 25, 1995) (App. 18a) ($16 million for 1995-96).

[7] *See* S. Rep. No. 100-222 (1988), *reprinted in* 1988 U.S.C.C.A.N. 101, 114 (noting disruptive effects of post-*Aguilar* delivery methods).

Eighth and Ninth Circuits,[8] but they continue nonetheless: a substantially identical challenge is pending in the United States District Court for the Eastern District of New York.[9]

D. The Decisions Below

In late 1995, these petitioners, parents of eligible children attending parochial schools in New York City, and the Chancellor of the Board of Education of the City of New York filed separate motions pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from the judgment that was entered pursuant to this Court's decision in *Aguilar*. The movants noted that five Justices had called for the overruling or reconsideration of *Aguilar*, and argued that subsequent decisions of the Court were in fact inconsistent with *Aguilar*. As the Establishment Clause is currently understood and applied, the movants argued, there is no constitutional impediment to providing Title I services to parochial school children in the same setting in which their public school counterparts receive the same services — in their regular school building.

The district court held that the movants had properly invoked Rule 60(b)(5) to seek relief from a continuing injunction based on a change in the governing law. App. 9a-10a. The court observed that "it is at least unusual, if not extraordinary, that the losing parties to a Supreme Court

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[8] *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995); *Board of Educ. v. Alexander*, 983 F.2d 745 (7th Cir. 1992); *Barnes v. Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991).

[9] *Committee for Pub. Educ. and Religious Liberty v. Secretary United States Dep't of Education*, No. 88-CV-96 (E.D.N.Y.) (JG) (pending).

case can point to such promising indicia that they would win the case now." App. 7a-8a. The court denied the motion on the merits, however, explaining:

> There may be good reason to conclude that *Aguilar*'s demise is imminent, but it has not yet occurred. More importantly, it is not so certain an event that this Court could properly anticipate it by affording the relief sought here. However, it does seem clear to me that the [movants] should be permitted to seek the reconsideration of *Aguilar* that a majority of the Supreme Court appears willing, if not anxious, to undertake. In addition, there could scarcely be a more appropriate vehicle for that review than the same case, in which, eleven years later, the same school board is struggling with the consequences of the Supreme Court's decision.

App. 10a.

The Court of Appeals affirmed the district court's judgment "substantially for the reasons stated in Judge Gleeson's Memorandum and Order." App. 13a.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition to reconsider a decision that has disrupted an important federal program and, even more importantly, created confusion in an important area of federal constitutional law. The question in this case is whether the Establishment Clause prohibits a local school board from providing remedial educational services to eligible parochial school children in the same

setting as their public school counterparts — on the premises of their regular schools. Put another way, the question is whether a limited form of unquestionably secular instruction may be provided neutrally and in similar fashion to a broad class of beneficiaries, defined without regard to religion.

In *Aguilar*, this Court concluded that the Establishment Clause prohibited giving parochial school children the same on-premises services that their public school counterparts enjoyed. Providing parochial school children with remedial instruction on the premises of their schools, the Court reasoned, presented a danger that "the Title I program [would be] used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school" — this, despite the fact that Title I teachers are employed not by the parochial school, but by the New York City Board of Education. 473 U.S. at 409. And, the Court held, the "supervisory system established by the City of New York [to prevent the promotion of religion] inevitably results in the excessive entanglement of church and state" — this, despite the fact that both the supervisors *and* the supervisees were employed by the Board. *Id.*

This decision should be reconsidered because it is at odds with subsequent decisions of the Court, because it relies upon a notion of entanglement of church and state that is unsupportable and no longer supported, and because it continues to foster a distorted understanding of what the Establishment Clause means. The decision should be reconsidered now, in the very same case, because it continues to impose unwarranted burdens on the parties and continues to interfere on a nationwide basis with the largest and most important federal program in the field of elementary and secondary education.

I. *AGUILAR v. FELTON* IS INCONSISTENT WITH SUBSEQUENT DECISIONS AND RESTS UPON AN UNWARRANTED INTERPRETATION OF THE ESTABLISHMENT CLAUSE

Aguilar stands as a repudiation of the principle that "[n]eutrality is what is required" by the Establishment Clause, *Roemer v. Board of Pub. Works*, 426 U.S. 736, 747 (1976) (Blackmun, J.) — neither endorsement nor hostility, neither favoritism nor discrimination, but neutrality. And it stands as the most extreme application of the notion that "excessive entanglement" between church and state is forbidden by the Establishment Clause. It is no surprise, therefore, that a majority of the Court has invited its reconsideration.

A. A Majority of the Court Has Called for the Overruling or Reconsideration of *Aguilar*.

This petition is a direct response to the invitation of five Justices two years ago in *Board of Education of Kiryas Joel Village School District v. Grumet*, 114 S. Ct. 2481 (1994). In that case, Justice O'Connor repeated her dissenting view in *Aguilar* that "[i]f the government provides [special] education on-site at public schools and at nonsectarian private schools, it is only fair that it provide it on-site at sectarian schools as well. I thought this to be true in *Aguilar* . . . and I still believe it today." *Id.* at 2498 (O'Connor, J., concurring in part and concurring in judgment). Noting that the pre-*Aguilar* delivery regime was "entirely permissible," *id.*, she wrote further that the Supreme Court "should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment

Clause jurisprudence back to what I think is the proper track — government impartiality, not animosity, towards religion." *Id.*

Justice Scalia, joined by the Chief Justice and Justice Thomas in *Kiryas Joel*, characterized *Aguilar v. Felton* as a case that is "hostile to our national tradition of accommodation" and that "should be overruled at the earliest opportunity." *Id.* at 2515 (Scalia, J., dissenting).

Justice Kennedy wrote that the single-religion school district issue presented in *Kiryas Joel* was "attributable in no small measure to what I believe were unfortunate rulings by this Court [in *Aguilar* and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985)]." *Id.* at 2505 (Kennedy, J., concurring in judgment). Justice Kennedy stated that "[t]he decisions in *Grand Rapids* and *Aguilar* may have been erroneous," and that "it may be necessary for us to reconsider them at a later date." *Id.*

In short, a majority of the Court has invited reconsideration of *Aguilar* in an appropriate case. And as the district court said, "there could scarcely be a more appropriate vehicle for review than [this] case," App. 10a — the very same case — in which the parties operate under a continuing injunction that imposes unnecessary costs on the government and deprives school children of valuable educational services.

B. *Aguilar* Conflicts with Subsequent Decisions of this Court.

"A central lesson of [this Court's] decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward

religion." *Rosenberger v. Rector of the University of Virginia*, 115 S. Ct. 2510, 2521 (1996). In the *Rosenberger* case, the Court upheld — in fact ordered — public university funding of the printing costs of a religious newspaper, because such funding was made available generally to qualifying student groups. The Court emphasized that "the guarantee of neutrality is not offended where, as here, the government follows neutral criteria and even-handed policies to extend benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.*

The Court made the same point in *Kiryas Joel*: "the [neutrality] principle is well grounded in our case law as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges." 114 S. Ct. at 2491 (Souter, J.).

The neutrality principle applies with special force in a case like this one, in which *purely secular* services are provided directly *to students*. The majority and dissent in *Rosenberger* differed over whether that case involved a direct subsidy of a religious organization, but there is no such question in this case.[10] In this case, all that is sought is the provision of purely secular services that cannot be diverted for a religious purpose. The dispute is not whether the services can be offered, but only where.

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[10] The dissenters in *Rosenberger* took the position that neutrality, or "evenhandedness," was not dispositive when, as they saw the case, direct public funding of religious activities was involved. 115 S. Ct. at 2540-44. But under the dissenters' analysis, evenhanded distribution of secular benefits to students, whose individual choices determine whether a church-related institution receives an indirect benefit, does not offend the Establishment Clause. *Id.* at 2541-42. That is the case here.

The answer to that question is provided by this Court's decision in another recent case, *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993). In *Zobrest*, the Court found no constitutional barrier to a public school district's providing a sign-language interpreter for a parochial student on the premises of the parochial school. The Court reasoned:

> When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," it follows under our prior decisions that provision of that service does not offend the Establishment Clause.

Id. at 10 (quoting *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986)). It did not matter that the religious school might derive some indirect advantage from such a program, the Court explained:

> We have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

509 U.S. at 8.

But *Aguilar* involved a "general program that 'is in no way skewed towards religion.'" *Id.* at 10. Title I "neutrally provides benefits to a broad class of citizens defined without reference to religion." *Id.* at 8. The Court

in *Zobrest*, however, did not attempt to reconcile the result in *Aguilar*.[11]

This Court's application of the neutrality principle in *Rosenberger* and *Zobrest* is of a piece with a host of previous decisions upholding the delivery of generally available services to parochial school students or allowing religious activities to proceed on public school premises:

- In *Board of Education v. Mergens*, 496 U.S. 226 (1990), the Court upheld the Equal Access Act,

[11] The Court did distinguish *Meek v. Pittenger*, 421 U.S. 349 (1975), and *School District of Grand Rapids v. Ball*, 473 U,S, 373 (1985), which was decided the same day as *Aguilar*, on the ground that those cases involved "direct grants of government aid [that] relieved sectarian schools of costs they otherwise would have borne in educating their students." *Zobrest*, 509 U.S. at 12. As the Court explained, "the religious schools in *Meek* received teaching material and equipment from the State, relieving them of an otherwise necessary cost of performing their educational function." *Id.* And in *Ball*, the programs "'in effect subsidize[d] the religious functions of the parochial school by taking over a substantial portion of their responsibility for teaching secular subjects.'" *Id.* (quoting *Ball*, 473 U.S. at 397). Indeed, in *Ball* the state-sponsored instruction was provided to *all* of the students in the nonpublic schools and covered a range of subjects — including art, music and physical education — that one would expect to find in any school. "[A]pproximately ten percent of any given nonpublic school student's time during the academic year would consist of [the state-sponsored instruction.]" *Ball*, 473 U.S. at 375 (citation omitted).

By contrast, Title I instruction in private schools is not provided to all students, but only to those who meet the statutory criteria of economic and educational disadvantage. 20 U.S.C. §§ 6313, 6315(b). And the instruction is limited to special remedial instruction that does not take the place of any instruction provided by the school. *See* 28 U.S.C. § 6322(b); 60 Fed. Reg. 34,800, 34,808 (to be codified at 34 C.F.R. § 200.12(a)).

which guaranteed student religious groups equal access to school facilities to conduct their meetings. Equal access for religious groups, Justice O'Connor wrote for the plurality, sends a "message . . . of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Id.* at 248.

- In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court rejected an Establishment Clause challenge to a state's extending vocational rehabilitation assistance to a blind person studying at a religious college. The Court emphasized that the assistance was provided to the student, not the school, and that the "program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." *Id.* at 487 (quotation omitted).

- In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld a state law allowing a deduction for tuition, textbook and transportation expenses, because "the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools." *Id.* at 397 (emphasis in original).

- In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court held that the Establishment Clause does not prohibit a practice of making school facilities available to religious student groups, when that

practice is based on a "policy of equal access, in which facilities are open to groups and speakers of all kinds." *Id.* at 267.

- In *Board of Education v. Allen*, 392 U.S. 236 (1968), the Court permitted the lending of textbooks to students in church-related schools, because "[t]he law merely makes available to all children the benefits of a general program to lend school books free of charge." *Id.* at 243.

- In *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court upheld the provision of bus transportation to public and nonpublic school children alike, explaining that the Establishment Clause "do[es] not . . . prohibit [the state] from extending its general state law benefits to all its citizens without regard to their religious belief." *Id.* at 16.[12]

[12] All of the cited cases, like this one, involved aid to students or their parents, or the use of school facilities by students. The neutrality principle has also been an important element of this Court's decisions upholding the provision of aid directly to church-related institutions for secular purposes. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 608 (1988) (upholding statute that provided funds to a religious organization for services related to adolescent sexuality, because a "fairly wide spectrum of organizations [were] eligible to apply for and receive funding under the Act," and the statute on its face was "neutral with respect to the grantee's status"); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (upholding state statute providing subsidies for secular purposes to religious and non-religious colleges alike); *Hunt v. McNair*, 413 U.S. 734 (1973) (rejecting challenge to state law making benefits available to all higher education institutions for secular purposes regardless of religious affiliation *vel non*); *Tilton v. Richardson*, 403 U.S. 672 (1971) (approving federal statute providing construction grants for secular purposes to all colleges and universities regardless of affiliation).

Aguilar is at odds with all of these decisions. Here, as in *Andrews v. Louisville & Nashville Railroad*, 406 U.S. 320 (1972), the Court should grant the petition because "[l]ater cases from this Court have repudiated the reasoning advanced in support of the result reached" in the earlier case. *Id.* at 322 (explaining that certiorari was granted to consider overruling Court's prior decision in *Moore v. Illinois Central Railroad*, 312 U.S. 630 (1941), and overruling *Moore*). At the very least, the vitality of *Aguilar* is placed in question by the Court's subsequent decisions in *Witters*, *Mergens*, *Zobrest* and *Rosenberger*, and reconsideration is, for that reason, appropriate.[13]

C. *Aguilar* Rests on an Extreme Application of a Repudiated Notion of Excessive Entanglement.

Aguilar ignored the neutral features of Title I, and dismissed the evidence demonstrating that Title I had not in fact resulted in any advancement of religion, based on its application of the "excessive entanglement" prong of the three-part *Lemon* test. But the *Lemon* test has since lost its place as a general test for identifying Establishment Clause violations, and the "excessive entanglement" prong in particular has been criticized, if not repudiated. The entanglement analysis in *Aguilar* is especially difficult to square with subsequent decisions, because the finding of excessive entanglement in *Aguilar* seems to have been based on a relationship between a supervisor employed by the

[13] *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977); *Marchetti v. United States*, 390 U.S. 39, 41 (1968); *Afroyim v. Rusk*, 387 U.S. 253 (1967); *see also Monell v. Department of Social Servs.*, 436 U.S. 658, 663 (1978) (overruling in part *Monroe v. Pape*, 365 U.S. 167 (1961)).

Board of Education and a teacher employed by the Board — in short, a relationship between *state and state*, not *church and state*.

The *Lemon* test has been criticized widely,[14] and a majority of the Members of this Court have acknowledged that criticism. The Chief Justice has noted accurately that the test lacks "grounding in the history of the First Amendment," "has . . . not provided adequate standards for deciding Establishment Clause cases," "has caused this Court to fracture into unworkable plurality opinions," and has produced results that "violate the historically sound principle" that individuals may enjoy the benefits of "general welfare programs" in connection with their attendance at parochial schools. *Wallace v. Jaffree*, 472 U.S. 38, 110-11 (1985) (dissenting).

Justice O'Connor has noted the "tension in the Court's use of the *Lemon* test to evaluate an Establishment Clause challenge to government efforts to accommodate the free exercise of religion." *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,

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[14] *See, e.g.*, Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795 (1993); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 127-34 (1992); Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 Geo. Wash. L. Rev. 645, 654-60 (1992); Mary Ann Glendon & Raul Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 503, 538 (1991); Gary J. Sinson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 Cornell L. Rev. 905, 908, 935 (1987); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 681 (1980); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3 (1978).

483 U.S. 327, 346 (1987) (concurring in judgment). More recently, Justice O'Connor has urged that the law be "freed from the *Lemon* test's rigid influence," and noted that "the slide away from *Lemon's* unitary approach is well under way." *Kiryas Joel*, 114 S. Ct. at 2500 (concurring and concurring in judgment).

Justice Scalia, joined by the Chief Justice and Justice Thomas, has noted the Court's "convenient relationship with *Lemon*" and pointed to the "sound reasons for abandoning" it. *Id.* at 2515 (dissenting). And Justice Kennedy, referring in particular to the *Lemon* test, has written that "[s]ubstantial revision of our Establishment Clause doctrine may be in order." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 656 (1989) (concurring in judgment in part and dissenting in part).

The fact is that although the three-part *Lemon* test has not been formally repudiated by the Court as a whole, it appears to have been abandoned — at least as a unitary test for determining Establishment Clause violations. Cases that might have been decided through application of the test have instead been decided based on notions of neutrality,[15] endorsement,[16] or coercion.[17]

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[15] *See, e.g.*, *Rosenberger*, 115 S. Ct. at 2521-25; *Capitol Square Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2446-47 (1995); *Zobrest*, 509 U.S. at 8.

[16] *See, e.g.*, *Rosenberger*, 115 S. Ct. at 2526-28 (O'Connor, J., concurring); *Capitol Square*, 115 S. Ct. at 2451 (O'Connor, J., joined by Souter, J., and Breyer, J., concurring in part and concurring in judgment).

[17] *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577 (1992).

The entanglement prong of *Lemon*, upon which *Aguilar* was based, has been subject to particular criticism, not only by commentators and individual Justices, but by the Court itself. In *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988), the Chief Justice, writing for the Court, noted that the case, like *Aguilar*, "presents . . . another 'Catch-22' argument: the very supervision of the aid to assure that it does not further religion renders the statute invalid. . . . For this and other reasons, the 'entanglement' prong of the *Lemon* test has been much criticized over the years." Justice White called the entanglement notion "curious and mystifying," "insolubly paradoxical," "redundant," "superfluous," and without "constitutional foundation." *Roemer v. Board of Pub. Works*, 426 U.S. at 768-69 (concurring); *see also Kiryas Joel*, 114 S. Ct. at 2499 (O'Connor, J., concurring and concurring in judgment).

Excessive entanglement was the only ground for the decision in *Aguilar*. Indeed, the decision in *Aguilar* was the Court's most extreme application of the entanglement notion. In *Lemon* itself, the Court struck down state programs that paid a portion of the salaries of regular full-time teachers in church-related schools. The Court was concerned "that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." *Lemon v. Kurtzman*, 403 U.S. 602, 618 (1971). The "surveillance" that would be required to ensure that such a teacher did not promote religion was thought to constitute excessive entanglement of church and state. *Id.* at 619.

But the teachers in *Aguilar* (this case), unlike in *Lemon*, are not employed by the church-related school; they are employed by a public school board. These teachers do not teach the regular curriculum, and it is no part of their

job to teach or promote religion in any way. To suggest that these public employees might be induced to teach religion merely because they are temporarily located on the premises of a church-related school is far-fetched and demeaning to their professionalism. It is also contrary to the undisputed evidence in the case, which showed that "in 19 years there ha[d] never been a single incident in which a Title I instructor 'subtly or overtly' attempted" to teach religion. *Aguilar*, 473 U.S. at 424 (O'Connor, J., dissenting); *see also id.* at 428.

Even more fundamentally, it is difficult to understand how any supervision of these Title I teachers could constitute excessive entanglement between religion and government. The teachers are employed by the same public school board as the individuals who supervise them. The supervision is *of* a public employee *by* a public employee. In short, the relationship is not one of *church and state* at all, but of *state and state*.[18]

Aguilar was the high-water mark of a flood that has since receded. In no case since *Aguilar* itself has the Court struck down a program or practice on entanglement grounds. It is apparent that the entanglement prong of *Lemon*, upon which *Aguilar* was based, has lost its vitality. And whatever can be said of the rest of *Lemon*, "excessive entanglement of church and state" can no longer be regarded as a constitutional defect in a program that provides Title I

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[18] *See Kiryas Joel*, 114 S. Ct. at 2499 ("'Entanglement' is discovered in public employers monitoring the performance of public employees — surely a proper enough function — on parochial school premises . . . .") (O'Connor, J., concurring in part and concurring in the judgment).

services to parochial school children in the same setting as their public school counterparts.

This Court should grant the petition to eliminate the entanglement prong as a formal Establishment Clause test — or to make clear, at the very least, that the notion of entanglement was misapplied in *Aguilar*.

II. *AGUILAR* HAS HAD A DISRUPTIVE EFFECT ON A NATIONWIDE PROGRAM THAT IS THE FEDERAL GOVERNMENT'S PRINCIPAL COMMITMENT TO ELEMENTARY AND SECONDARY EDUCATION.

This Court's decision in *Aguilar* has had profound effects — all of them negative — upon the provision of Title I remedial educational services to economically and educationally disadvantaged school children. The principal losers are families like petitioners and their children who attend parochial schools and need remedial services. Most of them are forced to leave their schools in the middle of the school day to receive the remedial instruction they need to keep up in their regular classes. That results in disruption and lost instructional time for the very students who can least afford it. Others receive computer-assisted instruction on the premises of their school, but they lose the advantages of having a teacher with them. For these reasons, the New York City Board of Education, like other school boards throughout the country, concluded that on-premises instruction by Title I teachers was the preferable educational alternative. That is the method of instruction that is available to eligible children in the public schools, but after *Aguilar* it is no longer available to eligible children in church-related schools.

Parochial school students are not the only losers under *Aguilar*. Eligible school children attending public schools have also been adversely affected, because the increased cost of alternative delivery systems has reduced the funding that is available to meet the instructional needs of *all* eligible school children in public *and* private schools.

The post-*Aguilar* Title I delivery methods are vastly more expensive to deliver than the on-premises method that they replaced. In the decade after entry of the injunction, more than $100 million has been spent in New York City alone to cover the additional cost of providing Title I services through these alternative means. The annual cost of complying with *Aguilar* in New York City alone is approximately $15 million.[19] Comparable costs have been incurred in connection with the provision of Title I services in other school districts throughout the country.[20]

To comply with the statutory mandate that educational services be provided equitably to both public and private school students, the Secretary of Education has ordered that the administrative costs of the alternative delivery systems be taken "off the top" of a school district's Title I allocation. In other words, local educational agencies must subtract administrative costs of complying with *Aguilar* "off the top" of their total allocation for all eligible students, before dividing remaining funds pro rata between eligible public and private school students. The result is that fewer Title I

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[19] Weiss Decl. ¶ 101.

[20] *See, e.g., Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1463 (9th Cir. 1995); *Pulido v. Cavazos*, 934 F.2d 912, 925 (8th Cir. 1991).

dollars are available for actual instruction to public and private school students alike.[21]

In short, money that could be used to increase the number of children who receive services under Title I is spent instead to cover the extra costs of providing educationally inferior services to a smaller number of children. The effect in New York City alone is dramatic. In the 1995-96 school year, as many as 5600 additional educationally needy children might have received Title I services — in both public and private schools — through funds that were spent instead to cover the additional administrative costs of complying with *Aguilar*.[22]

The Court has stated that "the Establishment Clause should not be seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community." *Wolman v. Walter*, 433 U.S. 229, 247 n.14 (1977). But in this case, the Establishment Clause has had precisely that effect.

CONCLUSION

It is apparent that the doctrinal underpinnings of *Aguilar* have been eroded by subsequent decisions, and that the result in *Aguilar* may no longer command the support of a majority of this Court. Yet a permanent, continuing injunction remains in effect in the case — imposing wasteful costs on the government, depriving economically and educationally disadvantaged children in the parochial schools

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[21] Weiss Decl. ¶¶ 101.

[22] *See* Statement of Secretary of Education Riley (Oct. 25, 1995) (App. 18a).

of the most effective form of remedial instruction to which they are entitled, and curtailing the level of Title I services to eligible public and private schools students alike.

The Court should grant the petition to overrule *Aguilar*, and to make clear that the Establishment Clause is not violated by a general program that provides limited and supplementary services of a purely secular nature directly to school children who meet religiously neutral criteria, simply because eligible parochial school children, like their public school counterparts, are permitted to receive those services in their regular schools.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Not for Publication

MEMORANDUM AND ORDER
78-CV-1750 (JG)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

- against -

SECRETARY, U.S. DEPARTMENT OF EDUCATION, CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendants,

RACHEL AGOSTINI, et al.,

Defendant-Intervenors.

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JOHN GLEESON, United States District Judge:

This case concerns the use of federal funds to provide remedial education to educationally deprived children in low-income neighborhoods. There have been prior decisions in the Second Circuit and the United States Supreme Court,[1] familiarity with which is assumed.

Briefly, for some 30 years, federal funds have been allocated to local school boards for remedial education programs pursuant to Chapter I of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801 et seq., and its predecessor, Title I of the Elementary and Secondary Education Act of 1965. The program will be referred to herein as the "Chapter 1" program.

The remedial instruction and other support services funded by the Chapter 1 program were (and still are) intended by Congress to benefit all eligible school children, whether or not they attend public schools. The defendant Chancellor of the Board of Education (the "Board"), the "local education agency" that proposed and implemented the Chapter 1 program for New York City, has provided in-school remedial instruction to public school students since

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[1] Felton v. Secretary of Dep't of Education, 739 F.2d 48 (2d Cir. 1984), aff'd sub nom Aguilar v. Felton, 473 U.S. 402 (1985).

the federal program began. Until 1985, the Board provided in-school remedial education instruction to qualifying private school students as well. However, the practice of sending public school teachers and guidance counselors into New York's private schools, the overwhelming majority of which are religious schools, was challenged on Establishment Clause grounds, and the Supreme Court agreed with plaintiffs that this use of public funds violated the First Amendment. Aguilar v. Felton, 473 U.S. 402 (1985).

On remand, this Court (Hon. Edward R. Neaher) issued an order, dated September 26, 1985, permanently enjoining the New York City Board of Education from using Chapter I funds to send teachers or guidance counselors into these religious schools. The Board has since devised several alternate (and mostly off-premises) methods of delivering these services to religious school students, the validity of which is not at issue here.

In the years since the Supreme Court's Aguilar decision, the landscape of Establishment Clause decisions has changed. The life expectancy of Aguilar itself is, to put it mildly, subject to question. Indeed, three justices of the Supreme Court have declared that Aguilar "should be overruled at the earliest opportunity." Board of Education of Kiryas Joel v. Grumet, 114. S.Ct. 2481, 2515 (1994) (Scalia, J., dissenting (joined by Chief Justice Rehnquist and Justice Thomas)). A fourth, who dissented in Aguilar, has expressed a desire to reconsider it and has strongly indicated that it should be overruled. Id. at 2498 (O'Connor, J., concurring). Finally, a fifth justice has stated that the Aguilar decision "may have been erroneous," and that it may

be necessary to reconsider it "in the interest of sound elaboration of constitutional doctrine." Id. at 2505 (Kennedy, J., concurring). These statements have made the Board, which continues at an indisputably enormous expense to use alternate methods of delivering Chapter 1 instruction to parochial school students, eager for an opportunity to get rid of the Aguilar decision.

This motion has been brought for that purpose. The Board has moved pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from the injunction entered by Judge Neaher. Defendant-Intervenors, who are parents of eligible children who attend nonpublic schools, have joined in the motion. Although both the Board and the Defendant-Intervenors suggest in their arguments that this Court can properly pronounce Aguilar dead and afford them relief from the injunction, at bottom all they seek is a procedurally sound vehicle to get the issue back before the Supreme Court.[2] The defendant Secretary of the U.S. Department of Education, who has supported the Board throughout this litigation, has observed that I cannot grant the motion because the Supreme Court has spoken in this very case, and its decision is not only binding precedent, it is also law of the case. Although the language of its submission is somewhat elliptical, the Secretary also appears to want an order that will eventually allow all of the defendants to seek reconsideration by the Supreme Court of

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[2] See, e.g., Reply Memorandum Of Law In Support of Defendant Chancellor's Motion For Relief From Judgment at 4 ("Defendant would be delighted to go directly to the United States Supreme Court. This course, however, is not available.").

its prior decision in the case.[3]

Insofar as it is relevant to this motion, Rule 60 (b) of the Federal Rules of Civil Procedure provides as follows:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence ... (3) fraud ... ; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. ...

The Board and the Defendant-Intervenors seek relief from Judge Neaher's injunction pursuant to clause 5. Relying on Rufo v. Inmates of Suffolk County Jail, 502 U.S.

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[3] Specifically, the Secretary states that although the motion cannot be granted, "we should not be understood to suggest that a reconsideration of [Aguilar] would be inappropriate in the Supreme Court. ... [W]e preserve our right to support a request by the Chancellor that the Supreme Court reconsider its ruling in this case." Federal Defendant's Response To Chancellor's Motion For Relief From Judgment at 6.

367, 384 (1992), they contend that a party seeking prospective relief from an injunction may meet its initial burden by showing either a significant change in the factual conditions or in the law. They contend that the criticisms of Aguilar by five Supreme Court justices in the Kiryas Joel case not only portend a significant change in the law, but actually constitute one.

Rule 60(b)(5) may properly be invoked to afford relief from an injunction when a change in the decisional law makes it no longer equitable to enforce it. New York State Ass'n For Retarded Children v. Carey, 706 F. 2d 956, 967 (2d Cir.), cert. denied, 464 U.S. 915 (1983); see generally 11 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, ¶ 2863 (1995). The Court in Rufo held that "modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent." 112 S.Ct. at 762. The principle applies to injunctions, and the Supreme Court has observed that "there are many cases where a mere change in decisional law has been held to justify modification of an outstanding injunction." System Federation No. 91, Railway Employees' Department, AFL-CIO v. Wright, 364 U.S. 642, 650 n.6 (1961).

I am mindful of the competing interest at issue here: the finality of judgments. Rule 60(b) may not be used as a substitute for appeal. However, it is plain that the Board's motion does not offend that rule. Indeed, there could have been no further appeal from the adverse decision by the Supreme Court in 1985. Moreover, it is at least unusual, if not extraordinary, that the losing parties to a Supreme Court case can point to such promising indicia that they would win

the case now.[4] Finally, the heart of the Aguilar result was the injunctive relief that restricts the Board's use of Chapter 1 funds now and into the future. In these circumstances, allowing the defendants to resuscitate pursuant to Rule 60 (b) the issue they lost in 1985 strikes the proper balance between the conflicting principles that litigation should have finality and that justice should be done. See C. Wright, et al., supra, § 2851 at 227.

Although plaintiffs have not explicitly relied on the law of the case doctrine in their effort to convince the Court not to "entertain" the motion, the doctrine deserves brief mention in this unusual procedural setting. It generally prevents a district court from deviating from a mandate from above. "However, the doctrine is limited by discretion and should be discarded for a 'compelling reason' such as 'an intervening change of law, significant new evidence, or the need to correct a clear error of law or manifest injustice.'" Whimsicality, Inc. v. Rubie's Costume Co., 836 F.Supp. 112, 116 (E.D.N.Y. 1993) (quoting United States v. Salerno. 932 F.2d 117, 121 (2d Cir. 1991)). Thus, if the Board were able to satisfy its burden of demonstrating a sea change in the law since Aguilar sufficient to warrant relief under Rule 60 (b), the law of the case doctrine would not preclude such relief.

Finally, plaintiffs' assertion that the motion is untimely is without merit. Under the rule, the motion must be made "within a reasonable time." Whether that has

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[4]As noted below, it is possible to make too much of the Aguilar-bashing mentioned above. The various comments about the decision in Kiryas Joel were made (or joined in) without the benefit of briefing and oral argument, and three of the five Justices involved were not on the Court when it decided Aguilar.

occurred depends on the facts of the case, the reason given for the delay, and whether the plaintiffs are prejudiced by the delay. Emergency Beacon Corp. v. Barr, 666 F.2d 754, 760 (2d Cir. 1981); see generally C. Wright, et al., supra, § 2866. Although the grist for the motion also includes the general development of the Establishment Clause cases since Aguilar, the Board relies most heavily on the opinions in Kiryas Joel which was decided on June 27, 1994. By resolution passed on June 7, 1995, the Board committed to seeking an overruling of Aguilar. Counsel for the Board has stated that, in light of the need to digest and discuss the issue, and its obvious political sensitivity, the Board acted as expeditiously as could reasonably be expected. Plaintiffs have not contested those representations, and in any event I accept them as a reasonable explanation for the delay in filing the motion, which occurred within a reasonable time after the Board's resolution.

Furthermore, there is no cognizable prejudice to plaintiffs as a result of the delay. True, they may lose what they obtained in 1985 if this case makes it back to the Supreme Court, but they have not suggested that they have been handicapped in litigating the issue by the passage of time.

In sum, I conclude that the Board has properly proceeded under Rule 60(b) to seek relief from the injunction. In a proper case, the rule is available for such relief when the intervening decisional law renders inequitable the continued enforcement of an injunction. Indeed, as a procedural device, it is far preferable to contemptuously defying the injunction by placing teachers back in the parochial schools, the course that, according to counsel for plaintiffs at oral argument, is the only proper means of obtaining appellate review of the continuing validity of the

injunction. Even assuming such a contempt citation would in fact permit review of the underlying merits of the Aguilar decision, I see no reason for reading Rule 60(b) to require such a result, and plaintiffs have provided none. Finally, under all the circumstances, the motion has been filed within reasonable time.

Having concluded that the motion is procedurally firm, I deny it on the merits. There may be good reason to conclude that Aguilar's demise is imminent, but it has not yet occurred. More importantly, it is not so certain an event that this Court could properly anticipate it by affording the relief sought here. However, it does seem clear to me that the Board should be permitted to seek the reconsideration of Aguilar that a majority of the Supreme Court appears willing, if not anxious, to undertake. In addition, there could scarcely be a more appropriate vehicle for that review than the same case, in which, eleven years later, the same school board is struggling with the consequences of the Supreme Court's decision.

The motion is denied. So Ordered.

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JOHN GLEESON
UNITED STATES DISTRICT COURT JUDGE

Dated: Brooklyn, New York
May 20, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDNY (bkny)
78-cv-1750
Gleeson

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the _____ day of one thousand nine hundred and ninety-six.

[file stamp]

Present: HONORABLE AMALYA L. KEARSE,
HONORABLE J. DANIEL MAHONEY,
Circuit Judges,
HONORABLE MILTON POLLACK,
District Judge.*****

_____

***** Honorable Milton Pollack, of the United States District Court for the Southern District of New York, sitting by designation.

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,
Plaintiffs-Appellees-Cross-Appellants,

- v. -

Nos. 96-6160, -6180, -6181

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,
Defendant-Appellee,

CHANCELLOR BOARD OF EDUCATION OF THE CITY OF NEW YORK and BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,
Defendants-Appellants-Cross-Appellees,

Felton v. Secretary, Nos. 96-6160, -6180, 6181.

RACHEL AGOSTINI, MARIA COSARCA, DIGNA DURAN, IVETTE ENCARNACION, MARIA L. FERNANDEZ, DOLLY CUTRERA THEN, JOSEPH M. THEN, MARGARET FIGUEROA, MICHELE GALLO, MARIE SEJOUR, JOAN JACKSON, CHERYL MALCOUSU, TONYA STEVENS and ROSEMARIE VASQUEZ,
Defendants-Intervenors-Appellants-Cross-Appellees.

Appearing for Defendants-Appellants:
Stephen J. McGrath, Deputy Chief, NYC Corp. Counsel, N.Y., N.Y.

Appearing for Intervenors-Appellants:
Kevin T. Baine, Williams & Connolly, Washington, D.C.

Appearing for Defendant-Appellee:
Howard S. Scher, U.S. Dep't of Justice, Washington, D.C.

Appearing for Plaintiffs-Appellees:
Stanley Geller, N.Y., N.Y.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was submitted by counsel for appellee United States Department of Education and was argued by counsel for the other parties.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed substantially for the reasons stated in Judge Gleeson's Memorandum and Order dated May 20, 1996.

/s/ Amalya L. Kearse
AMALYA L. KEARSE, U.S.C.J.

/s/ J. Daniel Mahoney
J. DANIEL MAHONEY, U.S.C.J.

/s/ Milton Pollack
MILTON POLLACK, U.S.D.J.

UNITED STATES DISTRICT COURT [file stamp]
EASTERN DISTRICT OF NEW YORK
- x

BETTY-LOUISE FELTON, CHARLOTTE GREEN, BARBARA HRUSKA, MERYL A. SCHWARTZ, ROBERT H. SIDE and ALLEN H. ZELON,

Plaintiffs,

JUDGMENT
78 CV 1750
(ERN)

-against-

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION and THE CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

-and-

YOLANDA AGUILAR, LILLIAN COLON, MIRIAM MARTINEZ and BELINDA WILLIAMS,

Intervenor-Defendants.

- x

A memorandum order of the Honorable Edward R. Neaher, United States District Judge, Eastern District of New York, having been filed on October 11, 1983, granting defendants' motion for summary judgment, denying plaintiffs' motion for summary judgment and directing the Clerk of Court to enter judgment in favor of defendants

dismissing the complaint, and the Clerk of Court having entered the judgment on October 20, 1983, and

An order of the United States Court of Appeals for the Second Circuit having been filed on July 9, 1984, reversing the order of the District Court and directing the District Court to enter judgment granting plaintiffs' cross-motion for a judgment declaring that New York City's plan under Title 1 of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §2701, et seq., violates the Establishment Clause, and an appropriate injunction, and directing that the District Court should afford sufficient time for the City to propose and the Secretary to approve an alternative plan, and staying the issuance of a mandate until thirty days after the final disposition of any timely petition for rehearing or suggestion for rehearing en banc, in order to enable defendants, if they remain aggrieved, to petition the Supreme Court for certiorari (or, if they should consider this appropriate, to appeal under 28 U.S.C. §1252), and, if such a petition be filed and/or such an appeal be taken, until the final disposition thereof, and

A judgment of the Supreme Court of the United States having been filed on July 31, 1985, affirming the judgment of the Court of Appeals, and the mandate of the Supreme Court having issued to the Court of Appeals on the same date, and

The mandate of the Court of Appeals having been filed in the District Court on August 26, 1985, it is

ORDERED and ADJUDGED that New York City's plan under Title 1 of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §2701, et seq., as superseded by Chapter 1 of the Education Consolidation and

Improvement Act of 1981, 20 U.S.C. §3801, et seq., violates the Establishment Clause of the First Amendment on entanglement grounds to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools, and it is further,

ORDERED and ADJUDGED that the defendants, the Secretary, United States Department of Education, and the Chancellor of the Board of Education of the City of New York, are permanently enjoined from using public funds for any plan or program under Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §3801, et seq., to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools within New York City, and it is further,

ORDERED and ADJUDGED, that in accordance with the opinion of the Court of Appeals, which was affirmed by the Supreme Court, this judgment shall be stayed until the start of the September 1986 school year, on condition that the Chancellor of the Board of Education of the City of New York shall, commencing December 2, 1985, and each 60 days thereafter, submit a written report to the Court and to counsel for the plaintiffs describing in reasonable detail the progress being made to conform the City's Title 1 plan to the requirements of this judgment.

/s/ Edward R. Neaher
U. S. D. J.

Dated: Brooklyn, New York
September 26, 1985

UNITED STATES DEPARTMENT OF EDUCATION
The Secretary

STATEMENT BY SECRETARY RILEY ON AGUILAR v. FELTON

In 1985, the Supreme Court held in Aguilar v. Felton that it is unconstitutional for public school personnel to provide instruction in religiously-affiliated private schools under Title I of the Elementary and Secondary Education Act. This decision has caused continuing problems in the Title I program for both public and private school children who need extra help. I therefore support reconsideration of the Felton decision in an appropriate case. In my opinion, Felton does not advance the progress of education or pass the test of good common sense. At a time when school budgets are under increased scrutiny, Felton places an additional undue burden on them.

The Felton decision has had a significant negative impact on Title I services for the neediest children in both public and private schools. Importantly, the costs of compliance with Felton are taken off the top of the school district's total Title I allocation, prior to providing funds for comparable instructional services for public and private school children. Therefore, compliance with Felton reduces the amount of Title I funds available for public school children, as well as private school children. Also, in the years immediately following the decision, there was a dramatic decrease in the number of private school children participating in the Title I program. Although the number has increased in subsequent years, the underlying problems caused by the Felton decision continue. Instead of having Title I services

in their own school buildings, as public school children generally have, religious school children must go to another location to receive instruction from a teacher. This creates not only logistical problems, but significantly increases costs (for such things as transportation or the purchase or rental of mobile vans) which adversely affects both public and private school children. I believe we must make more effective use of Title I dollars to support our neediest students in both public and private schools. Felton stands in the way of our doing so.

Based on a 1989 study by the General Accounting office, we estimate that school districts have expended hundreds of millions of dollars on non-instructional costs in order to comply with Felton. For example, for the 1995-96 school year, New York City alone is budgeting $16 million for these costs. It is estimated that $10 million of this amount will come from a special Title I appropriation, but the remaining $6 million will have to come off the top of New York City's regular Title I grant. This $6 million could be used to serve 5600 additional needy students in both public and private schools, or alternatively to improve services for the thousands of children already being served under Title I in New York City. However, until Felton is reconsidered, New York City and other school districts must continue to comply with that decision.

As demonstrated by the facts of the original case, we believe that Title I services can be provided in private schools without aiding religion or creating excessive entanglement between government and religion. This Department has also supported and defended in litigation a variety of alternative arrangements for providing Title I services for private school children, including providing computer-assisted instruction in private schools and, in appropriate circumstances, parking

mobile vans on or near private school property. There has been criticism, however, that even the alternative arrangements that have developed as a result of Felton are not the most educationally effective methods for providing Title I services. In addition, the Felton decision at times has caused unnecessary tension between public and private school officials concerning how and where Title I services should be provided for private school children.

In light of these continuing problems, I support efforts to have the Felton decision reconsidered in an appropriate case.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

CERTIFICATION OF COPY OF DEPARTMENT RECORD

Pursuant to the provisions of 20 U.S.C. 3485 and the authority vested in me by redelegation from the General Counsel, I hereby certify that the attached document entitled "STATEMENT BY SECRETARY RILEY ON AGUILAR v. FELTON" is a true and accurate copy of a document issued by the United States Secretary of Education on October 25, 1995.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Department of Education, on this 14th day of December 1995.

/s/ Philip Rosenfelt
Philip Rosenfelt
Assistant General Counsel for
Elementary, Secondary, Adult
and Vocational Education